

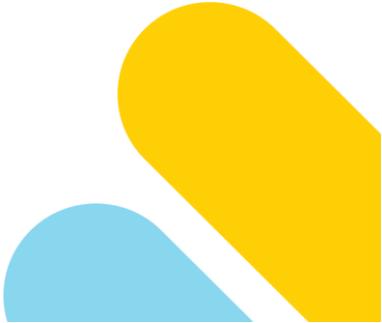
Internal dispute resolution: Update to RG 165

Submission in response to ASIC's
consultation paper 311
Australian Financial Complaints
Authority

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Contents

- Overview..... 1**
- Key points 2
- Definitions – ‘complaint’ and ‘small business’..... 3**
- Definition of complaint: Proposal B1 3
- Guidance on what amounts to a complaint: Proposal B2..... 3
- Definition of small business: Proposal B3 3
- IDR data 4**
- Recording IDR data: Proposals B4 and B5..... 4
- Publishing IDR data: Proposal B7 5
- IDR Responses..... 6**
- Minimum content requirements: Proposal B8 6
- Applying the same requirements to all financial firms: Proposal B9..... 7
- IDR timeframes..... 7**
- Reduced maximum timeframes: Proposal B11(a) and (b) 7
- Delay notifications in exceptional circumstances: Proposal B11(c) 8
- Further guidance for financial firms joined to complaints 8
- Role of customer advocates 8**
- Systemic issues 9**
- New requirements to apply to complaints in IDR: Proposal B13..... 9
- AFCA’s role..... 9
- Serious contraventions 10
- Appendix – About AFCA 11**



Overview

The Australian Financial Complaints Authority¹ (AFCA) is the independent external dispute resolution (EDR) scheme for the financial sector. We welcome the opportunity to provide comments on ASIC's Consultation Paper 311 *Internal dispute resolution: Update to RG 165* released in May 2019.

This submission² draws on the experience of AFCA and its predecessors – organisations that have handled financial services complaints for more than 25 years.

AFCA strongly believes that internal dispute resolution (IDR) plays a crucial role in the framework to resolve complaints about financial services. As IDR provides the first opportunity to resolve complaints, it is the key to early resolution, which benefits consumers, financial firms and the financial sector broadly.

In our view, IDR should focus on helping financial firms to improve internal practices to avoid and resolve disputes. In this regard, AFCA has a shared objective with financial firms to resolve disputes. The ultimate objective when designing IDR standards should be to ensure complaint handling by financial firms is fair, easy to use, timely and transparent. Improved standards should not only improve the quality of complaint resolution but also reduce the number of complaints made. It can also allow financial firms to deliver better outcomes for consumers and reduce the need to escalate complaints to EDR.

AFCA strongly supports measures to ensure IDR is made as fair, accessible and timely as possible. In our view, financial firms should view IDR as the opportunity to:

- Investigate complaints efficiently and thoroughly
- Remediate complainants fairly if need be
- Learn from complaints to improve processes and service delivery
- Build trust in the financial sector

If financial firms wish to self-regulate, they need to build trust. In our view, quality IDR by financial firms is critical and can assist to improve trust and restore the customer and financial firm relationship where that trust may have been eroded. Underpinning this AFCA considers that financial firms should conduct themselves ethically when handling complaint.

¹ The Appendix provides a brief overview of AFCA. For comprehensive information about AFCA, see our website www.afca.org.au.

² This submission has been prepared by the staff of AFCA and does not necessarily represent the views of individual directors of AFCA.

AFCA strongly considers that model litigant processes can provide a good starting point for handling complaints in both IDR and EDR and we encourage financial firms to consider if they are acting fairly in the resolution of complaints. Financial firms should be asking themselves what should they have done when assessing concerns raised by consumers.

AFCA is currently undertaking our Fairness Project which involves developing a framework which outlines how we make decisions that are fair under the AFCA Rules. We anticipate that this work could have benefits to financial firms and how they approach complaints in IDR fairly and appropriately. We look forward to consulting with financial firms, consumers and other stakeholders in relation to this work.

Key points

AFCA supports the initiative to update RG 165 and, in broad terms, supports the proposed approaches outlined in CP 311.

Generally, AFCA's considers that:

- IDR requirements should be consistent across financial firms
- IDR standards should apply to all complaints
- IDR requirements should be designed to fit together with EDR requirements
- publication of IDR data should be coordinated with publication of EDR data to produce comprehensive, consumer friendly information about complaints

Definitions – ‘complaint’ and ‘small business’

Definition of complaint: Proposal B1

AFCA submits the proposed change to the definition of ‘complaint’ is appropriate. We agree that social media provide legitimate and convenient channels for complaints.

Guidance on what amounts to a complaint: Proposal B2

With new forms of complaints emerging, it is very important that RG 165 provides up to date guidance on what amounts to a complaint. Draft 165.32 is also a key provision to ensure complaints are categorised correctly so that they are handled effectively through IDR processes.

Draft 165.32 could be worded more broadly to cover situations not described in items (a) to (c). One option would be to present items (a) to (c) as examples of situations where complaints could be categorised incorrectly, rather than an exhaustive list.

A situation that might need particular guidance is where a complaint is incomplete or expressed poorly. We acknowledge that Draft 165 requires financial firms to assist complainants but believe strong specific measures are needed to ensure consumer concerns, whatever their form, are responded to appropriately.

Our feedback on the issues noted in CP 311.40 is as follows:

- Industry codes include provisions for the interaction between complaints and other processes. For example, the Insurance in Superannuation Voluntary Code of Practice and the Life Insurance Code of Practice provide for interaction between claims and complaints processes.
- AFCA believes objections to superannuation death benefit distributions should be treated as complaints. We have observed that, in practice, trustees currently deal with these objections as complaints within the 90-day IDR timeframe that applies to superannuation complaints.
- AFCA’s Fact Sheet, [Insurance in superannuation](#), provides information about how a complaint about insurance in superannuation should be lodged with AFCA and we suggest this could be used by financial firms as a guide for handling these complaints at the IDR stage.

Definition of small business: Proposal B3

CP 311.45 explains that the rationale for Proposal B3 is to guarantee consistent dispute resolution access for small business complainants through both IDR and EDR. AFCA agrees that small business complainants with access to EDR should also have access to IDR. There is no compelling reason for small business customers to be denied access to IDR.

The discussion of Proposal B3 in CP 311 refers to the definition of small business in the [AFCA Rules](#). This definition is one provision that determines whether a small business can access EDR at AFCA. Another provision that may affect access is AFCA Rule C.1.2f), which excludes from AFCA’s jurisdiction:

a complaint where a Complainant is a member of a group of Related Bodies Corporate and that group has 100 employees or more.³

AFCA suggests that ASIC should, when altering the definition of small business for IDR purposes, also replicate the exclusion in AFCA Rule C.1.2f) for a body corporate within a group with 100 or more employees. This would align access arrangements for IDR and EDR.

IDR data

It is noted that ASIC and AFCA will work together to develop a mechanism to link IDR data and EDR data to enable a better understanding of the complete complaint lifecycle. AFCA has already had some discussions with ASIC about systems for data reporting and we look forward to contributing further to this work.

Recording IDR data: Proposals B4 and B5

AFCA agrees that proposed requirements for recording the product or service line, category and type for complaints in IDR should be consistent with AFCA’s approach to recording data. We have identified areas where the proposed requirements depart from our approach and will discuss this with ASIC further.

Other differences between AFCA’s approach to recording data and the proposed approach in the draft data dictionary may also require further consideration, given the importance of coordinating reporting across IDR and EDR. Examples of the differences are noted in the table below.

Item in draft data dictionary	AFCA approach
7 - Financial firm’s primary business sector	AFCA uses different classifications based on sales and service channels.
8 - Financial firm’s primary business subsector	
10 - Complainant type	AFCA uses more specific categories to: <ul style="list-style-type: none"> • identify complaints made by joint complainants or deceased estates • indicate whether small business complainants are incorporated.
12 - Complainant age	AFCA records an individual complainant’s date of birth where provided.
32 - Complaint issue	AFCA uses broad issue type classifications (corresponding with 9 of the 11 complaint issues in item 32) and, within issue types,

³ Terms with capital letters are defined in rule E.1 in the AFCA Rules.

Item in draft data dictionary	AFCA approach
	classifies complaints by specific issues.
34 - Complaint outcome	AFCA records complaint outcomes in detail. We have 20 outcome types, each with several specific outcomes.

The last example noted in the table relates to complaint outcomes. We consider that item 34 should provide a more detailed range of outcome codes. For example, we suggest there should be a code for discontinued complaints (including withdrawn complaints) as they should not be included in the ‘in favour of entity’ category. In this context we note that Draft 165.197 and 198 require financial firms to collect, analyse and report on numbers of complaints withdrawn or abandoned.

The ‘guide for use’ column in the draft data dictionary indicates that, for a complaint about more than one issue, item 32 only requires the financial firm to record the ‘primary’ issue.⁴ AFCA seeks to record **all** of the issues in a complaint and believes this approach is necessary to ensure data is complete. To obtain high quality data, ASIC should in our view require firms to record all of the issues in complaints. If firms are required to record only a complaint’s primary issue, guidance may need to clarify this question: How should a financial firm determine what the primary issue is in a multiple issue complaint?

The only demographic information about small business complainants gathered through the draft data dictionary is the geographic information referred to in item 14. Other information about these complainants - such as the size, age and type of business or whether the business is a primary producer - could make IDR data more useful. However, we acknowledge that the burden of recording and reporting obligations should be kept to a minimum.

If a financial firm is aware that a complainant has special needs, the firm should record the special needs, so they can be accommodated. Clause 8.4(e) of the complaint management standards AS/NZS 10002:2014 requires the record of a complaint to identify ‘any support requirements needed by the complainant’. AFCA suggests RG 165 imposes a similar requirement. This could be done by adding an item to the draft data dictionary to cover special needs.

Publishing IDR data: Proposal B7

AFCA reports EDR data in accordance with AFCA Rule 20, as explained in our Operational Guidelines. Our reporting includes the publication of comparative tables.

⁴ Compare Proposal B8 in CP 311, which includes a requirement for the IDR response to a complaint to identify and address **all** the issues raised in the complaint.

As IDR data is to be linked with EDR data, and both sets of data are to be published, it is important to present all of the data in a consistent, user friendly format.

Over recent years, AFCA's predecessors developed and refined systems for publishing EDR data, taking into account feedback obtained through extensive consultation. We believe our approach to publishing data is well recognised and understood and could provide a broad guide to follow in publishing IDR data.

CP 311.71 states that ASIC will later conduct a targeted consultation about its approach to publishing IDR data. AFCA would like to participate in the further consultation.

IDR Responses

Minimum content requirements: Proposal B8

AFCA strongly agrees that the quality of IDR responses should be improved. More broadly, we support measures to ensure financial firms communicate clearly with consumers about crucial matters in complaint resolution. In our view, firms should, for example, promote EDR and explain the role of AFCA and how complaints can be submitted to it.

AFCA agrees with the proposed content requirements for IDR responses to include reasons for the complaint decision being made by the financial firm. We agree that it is very important to the consumer to understand the reasons why the financial firm has or hasn't taken a particular view. Improving the IDR responses and quality of decision making by firms dealing with complaints in IDR should be the paramount focus for financial firms. As stated above AFCA's work in developing a fairness framework may assist financial firms in how they might handle complaints in IDR fairly.

AFCA believes RG 165 should require an IDR response to include information about EDR time limits to help consumers make decisions about exercising their EDR rights. Information about time limits for submitting complaints to AFCA is provided in our Operational Guidelines, which are published on our website.

The dates of IDR responses affect EDR time limits. To ensure time limits are clear to consumers, RG 165 could require IDR responses to include, in addition to the information described in Draft 165.74:

- statements to highlight that the IDR process has concluded and the IDR response sets out the final outcome of the complaint
- EDR time limit information.

In recent years, we have seen cases where financial firms have not met requirements to inform consumers about their EDR rights or provided incorrect advice on whether

consumers could pursue EDR. We believe financial firms need to do more to ensure they give consumers accurate EDR information in a helpful form. In this area, more detailed guidance or focussed surveillance may be required to improve standards.

We acknowledge the risk that IDR responses might not accurately state complex time limits. A possible approach to consider is:

- For complaints about death benefit claims made to superannuation funds, require IDR responses to state the 28-day time limit for submitting complaints to AFCA. This time limit can be stated simply and, because it is short, should be highlighted early.
- For other complaints, require IDR responses to provide information about EDR time limits in accordance with requirements in AFCA's Operational Guidelines.

It would be helpful for RG 165 to explain the consequences of providing incomplete responses to complaints. For example, if a response does not meet the requirements in the definition of IDR Response in Section E.1 of the AFCA Rules, the two-year time limit in Rule B.4.2.1b) does not apply. RG 165 could also highlight that IDR responses should not contain any statement that pre-empts AFCA's decision as to whether a complaint can be referred to AFCA.

We note that other provisions in Draft 165, such as Draft 165.122 and 125, should take into account any changes made to Draft 165.74.

Applying the same requirements to all financial firms: Proposal B9

Draft 165.75 sets out requirements for an IDR response to meet when it states the reasons for a decision to reject or partly reject the complaint. AFCA believes it is appropriate to apply these requirements to IDR responses provided by all financial firms, including superannuation trustees.

IDR timeframes

Reduced maximum timeframes: Proposal B11(a) and (b)

AFCA supports initiatives to require complaints to be handled promptly and properly. In our experience lengthy IDR complaints handling unnecessarily exacerbates the situation and complainants' grievances can increase the longer something is unresolved. The risk of increased stress and inconvenience on complainants is real and can lead to further complaints.

We note that, as well as introducing reduced maximum timeframes for IDR, Draft 165 includes standards to ensure the quality of IDR is adequate such as Draft 165.154, 155, 179 and 202.

If there is any risk that timeframe reductions might have an adverse impact on IDR, ASIC could consider steps such as:

- expressing safeguards for crucial objectives such as fairness and responsiveness in stronger terms
- making these safeguards enforceable provisions of RG 165.

Delay notifications in exceptional circumstances: Proposal B11(c)

Where a financial firm cannot meet a timeframe for an IDR response, Draft RG 165.118 requires the firm to provide a delay notification. The guidance states that the notification process should only be used in 'exceptional circumstances' but does not explain what would amount to exceptional circumstances.

In AFCA's view the meaning of 'exceptional circumstances' should be explained. If notifications are used too extensively, they could undermine requirements for complaints to be handled promptly.

Where there are delays in complaint resolution, trust can break down. Financial firms must ensure they have the complaint handling resources needed to meet requirements for timeliness and requirements in related areas such as reporting and transparency.

Further guidance for financial firms joined to complaints

AFCA has identified an issue affecting complaints in which financial firms are joined as parties. The firms joined to complaints have sought an additional IDR period, after the joinder. We are concerned about the delay this may cause.

To ensure complaints are resolved promptly, AFCA believes the guidance on maximum timeframes in RG 165 should provide additional direction to financial firms joined to complaints. In our view these firms should be encouraged to complete IDR without using a full extra IDR period as this causes further delay to the resolution of complaints.

Role of customer advocates

In relation to proposal B12, AFCA supports the approach of using customer advocates to enhance IDR arrangements. However, we believe it is necessary to clarify that the use of a customer advocate should in no way reduce the IDR obligations of financial firms.

Draft 165.117 deals with some aspects of complaint resolution that could be affected by the use of customer advocates. We suggest RG 165 includes a broader statement to explain that, whether or not a customer advocate performs any role in IDR, the financial firm bears responsibility to comply with RG 165.

Systemic issues

New requirements to apply to complaints in IDR: Proposal B13

AFCA supports Proposal B13. We would expect this measure to lift the standard of conduct in the financial sector by improving the identification, escalation and analysis of systemic issues.

Draft 165.128 sets out a succinct definition of systemic issue with one example. We believe RG 165 should explain the concept of systemic issue in more detail and provide a range of examples. Our experience suggests the concept is not well understood by all financial firms. In superannuation, ASIC's regulatory guidance about systemic issues has only applied for a short time.

The definition in Draft 165.128 refers to effects on **complainants** and in our view, this introduces a limitation. The definition could, for example, include an issue that affects, or has the potential to affect, more than one **consumer** (to use the broad group of consumers instead of the narrower group of complainants). This issue warrants further consideration.

AFCA's role

Systemic issues linked to complaints submitted to AFCA

Draft 165.134 and 135 acknowledge AFCA's role in relation to systemic issues, which includes identifying, investigating and working with financial firms to address issues. In future, a complaint submitted to AFCA may involve a systemic issue that the financial firm has handled, or is handling, in accordance with Part E of Draft 165.

In this situation, the financial firm should provide AFCA with information and assistance based on the firm's work on the systemic issue. For greater clarity, we suggest RG 165 includes guidance outlining the firm's obligation to provide this information and assistance to AFCA.

Systemic issues without known links to complaints submitted to AFCA

Information about a systemic issue not known to be linked to a complaint submitted to AFCA can help us perform our role. For example, AFCA can use this information to:

- identify a group of complaints affected by the systemic issue and deal with the complaints more efficiently
- answer inquiries about how the consumers affected by the issue can seek compensation – for instance, through remediation
- take a more pro-active approach to complaint resolution, and by doing so, benefit consumers, financial firms and the industry broadly
- anticipate numbers of complaints expected, to improve AFCA's efficiency, resourcing and forecasting.

AFCA would like to obtain more information about significant systemic issues without known links to complaints that have reached EDR. As an initial step, consideration could be given to the question of how AFCA could receive the information. Related to this, it is anticipated that AFCA may have an increased role when financial firms are undertaking broad scale remediation programs. We look forward to further discussion in relation to the area of remediation programs.

Serious contraventions

Processes and systems required to meet the requirements in Proposal B13 could be used for identifying, escalating and reporting serious contraventions of the type referred to in section 1052E of the Corporations Act as well as for systemic issues. We suggest ASIC considers whether the requirements should be extended to cover any serious contraventions that do not amount to systemic issues.

Appendix – About AFCA

AFCA is the new independent EDR scheme for the financial sector replacing the Financial Ombudsman Service, the Credit and Investments Ombudsman and the Superannuation Complaints Tribunal.

AFCA sees its purpose as providing fair, independent and effective solutions for financial complaints. It does this not only by providing complaint resolution services free to consumers, but also by working with its members to improve their processes and drive up industry standards of service, thereby minimising complaints.

More broadly, AFCA plays a key role in restoring trust in the financial services sector. In addition to providing solutions for financial complaints, AFCA has responsibilities⁵ to identify, resolve and report on systemic issues and to notify ASIC, and other regulators, of serious contraventions of the law.

AFCA's service is offered as an alternative to tribunals and courts to resolve complaints consumers and small businesses have with their financial firms. We consider complaints about:

- credit, finance and loans
- insurance
- banking deposits and payments
- investments and financial advice
- superannuation.

AFCA's role is to assist consumers and small businesses to reach agreements with financial firms about how to resolve their complaints. We are impartial and independent.

If a complaint does not resolve between the parties, we will decide an appropriate outcome, including awarding compensation for losses suffered or substituting the trustee's decision in the case of a superannuation complaint.

⁵ See [ASIC's Regulatory Guide 267](#) *Oversight of the Australian Financial Complaints Authority*.